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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY D. MOORE,

Defendant and Appellant.

E071275

(Super.Ct.No. FSB1200464)

OPINION

APPEAL from the Superior Court of San Bernardino County. Steve Malone,  
Judge. Affirmed.

Robert L. Hernandez, under appointment by the Court of Appeal, for Defendant  
and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Anthony D. Moore appeals from a victim restitution  
order. We find no error and affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

Defendant conducted transactions at a Walmart over the period of a few months with stolen credit card information.

Defendant was charged by felony complaint with two counts of second degree commercial burglary (Pen. Code<sup>1</sup>, § 459, counts 1 & 5), two counts of theft of access card account information (§ 484e, subd. (d), counts 2 & 6), two counts of grand theft (§ 487, subd. (a), counts 4 & 8), and two counts of identity theft (§ 530.5, subd. (a), counts 3 & 7). He pled not guilty to all counts. Defendant subsequently entered a plea agreement and pled guilty to count 3 (identity theft) and count 4 (grand theft). In exchange, the court agreed to place him on felony probation for three years and dismiss the remaining counts. The plea agreement included a *Harvey*<sup>2</sup> waiver, which stated the following: “I waive my rights regarding dismissed counts and/or allegation(s) and any charges the district attorney agrees not to file to the extent that the Court may consider these factors in deciding whether or not to grant probation and in deciding whether or not to impose a midterm, aggravated or mitigated prison term, the appropriate presentence credits, and as to restitution.”

The court held a sentencing hearing on July 2, 2015. Pursuant to the plea agreement, the court withheld pronouncement of judgment and placed defendant on

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<sup>1</sup> All further statutory references will be to the Penal Code, unless otherwise noted.

<sup>2</sup> *People v. Harvey* (1979) 25 Cal.3d 754.

probation for a period of three years on specified terms, including paying restitution to Walmart in the amount of \$127,110.68, plus a 10 percent administration fee, as recommended in the probation report. Defense counsel requested a formal restitution hearing on the amount. However, the court declined, since the probation department had set forth the amount.

On January 11, 2016, the court held a hearing at the request of defendant, who pointed out a typographical error in the restitution order, which stated the amount owed was \$1,271,100.68. The public defender noted that there was no explanation as to how the probation department came up with the amount and requested a formal restitution hearing again. The court observed that the police report indicated there had been an investigation and the losses were above \$140,000. The court decided not to set a formal restitution hearing at that point in time, but set a hearing to review the transcript of the hearing from July 2, 2015, to see if counsel reviewed the terms of the plea agreement with defendant and if he agreed to the terms. The court modified the restitution order to reflect that defendant owed the amount of \$127,110.68.

On February 9, 2016, the court referred the matter to the probation department for a detailed memorandum regarding victim restitution. The court subsequently set a hearing for April 22, 2016. The hearing was continued several times.

On March 16, 2016, the probation department filed a restitution memorandum, which included a copy of the terms of defendant's probation and his signature indicating his acceptance of them. The memorandum also included a copy of the police report,

detailing the investigation. The report stated that the loss prevention officer from Walmart provided a spreadsheet of the charges made with fraudulent cards; she also provided videotape, register tape, and receipts. Based on these transaction records, the total losses from 11 suspects was \$168,254.87, and the losses attributable to defendant totaled \$127,110.68.

On October 20, 2017, the court authorized an evidentiary hearing on the restitution amount. The prosecution advised the court of its intention to seek a writ.<sup>3</sup> The matter was continued several times.

The court held a restitution hearing on August 28, 2018. At the outset, the court reviewed what had occurred in the case: a restitution order was issued ordering defendant to pay \$127,110.68 in restitution to Walmart, based on the loss prevention's officer's investigation; the court granted permission for the public defender's office to have a hearing to determine the amount of restitution defendant was responsible for, and it placed the burden of proof on the prosecution to establish what the amount was; the prosecution filed a writ of mandate; and this court determined the burden of proof was on defendant to establish that the restitution amount ordered was excessive. The court then referred to the spreadsheet which showed over 500 transactions from August 31, 2011 to January 23, 2012, totaling \$127,110.68. It also noted that the loss prevention officer

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<sup>3</sup> The prosecution did file a writ petition, which this court granted. We take judicial notice of the writ opinion in case No. E069421. (Evid. Code, § 459.) This court determined that defendant should bear the burden of establishing that the ordered restitution amount was excessive.

identified defendant as the person who conducted the transactions at Walmart with the stolen credit card information. The court stated that defendant had the burden to challenge that amount.

Defense counsel argued there was a lack of foundation for the spreadsheet, and there was no evidence that Walmart paid anything out as a result of the fraudulent charges. Defense counsel further contended that defendant was charged by complaint with conduct stemming from two dates (January 12, 2012 and January 22, 2012), but the spreadsheet included transactions from more dates. Defense counsel requested that there be no restitution order, or that restitution be limited to the two dates listed in the complaint. Defense counsel stated it had no other evidence to present, aside from the information in the probation report and the spreadsheet.

The court acknowledged that, in the writ opinion, this court concluded that the prosecution had made a prima facie showing of the loss. As to whether Walmart suffered a loss, the trial court referred to defendant's statements when he was interviewed at the probation department. He admitted to the offenses and stated that he was "caught up in the money" and enjoyed buying expensive things and going to Las Vegas. The court concluded that Walmart did suffer a loss. It further noted that defendant agreed to a *Harvey* waiver and was therefore responsible for losses that were not included in the complaint.

The prosecutor submitted exhibits and noted that, at the time of the plea, defendant and his counsel had possession of the spreadsheet created by the Walmart loss prevention

officer. The court recognized that defendant was on notice of the restitution amount when he agreed to the *Harvey* waiver.

The court found that the defense was provided with the spreadsheet, which listed store locations, dates, times, cash registers, and amounts. The court further noted that this court held the prosecution had established a prima facie case that Walmart suffered a loss of \$127,110.68. It concluded that defendant had not challenged the prima facie record and ordered restitution to remain in the amount of \$127,110.68.

### ANALYSIS

Defendant appealed and, upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case and the following potential arguable issues: (1) whether the court properly placed the burden on defendant to prove that the amount of restitution was incorrect; and (2) whether the court erred in using dismissed counts and uncharged conduct in determining the amount of restitution.

We offered defendant an opportunity to file a personal supplemental brief, which he has not done.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error. We have now concluded our independent review of the record and find no arguable issues.

DISPOSITION

The judgment is affirmed.

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McKINSTER  
Acting P. J.

We concur:

MILLER  
J.

SLOUGH  
J.